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No. 75-1597

In the Supreme Court of the United States

OCTOBER TERM, 1976

JOHN H. BROWN AND JOHN W. CURINGTON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. App. A-1 to A-3) is reported at 525 F. 2d 1256.

JURISDICTION

The judgment of the court of appeals was entered on January 15, 1976, and a petition for rehearing was denied on March 4, 1976. On March 23, 1976, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to May 3, 1976, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court erred in denying petitioner's motion to suppress evidence allegedly obtained by illegal electronic surveillance conducted by private individuals.

2. Whether pre-indictment delay deprived petitioners of due process of law.

3. Whether the government's alleged failure to disclose certain evidence to the defense deprived petitioners of a fair trial.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioners were convicted on three counts of mail fraud, in violation of 18 U.S.C. 1341. Imposition of sentence was suspended and petitioners were placed on three years' probation on condition that they pay their victim restitution in the amount of $2,501.40. Petitioners were also fined $1,000 on each count. The court of appeals affirmed *per curiam* (Pet. App. A).

1. The evidence at trial established that petitioners, former employees of the Hunt Oil Corporation ("Hunt Oil"), defrauded HLH Products ("HLH"), a division of Hunt Oil, by establishing a brokerage firm to receive fees for servicing an HLH account when no such fees had in fact been authorized by Hunt Oil or HLH and no services were actually rendered by petitioners (Pet. App. A-1).

HLH Products owned and operated food processing plants in different areas of the country. Petitioner Brown was employed by HLH as its sales manager, while petitioner Curington was in charge of the company's day-to-day operations (Tr. 465-466). In December 1967, petitioner Brown met with James Burkett, an institutional sales representative for HLH, and asked Burkett whether he would like to establish a food brokerage business in the Chicago area. When Burkett assented, petitioner Brown instructed Burkett to set up a company in Chicago, but cautioned him not to use his own name or his home address in connection with the company. Burkett then founded an Illinois corporation named D. Buckingham's, Ltd. (Tr. 482-496).

On September 9, 1968, petitioner Brown wrote a letter to H. L. Hunt, principal stockholder of Hunt Oil, stating that he had met recently with the chief buyer of canned vegetables for Topco Associates and that the buyer had "suggested that we pay brokerage on their purchases to Buckingham, Ltd." (Tr. 470-471). Petitioner Brown advised acquiescing in the request for fear of losing the Topco account if the brokerage were not paid (*ibid.*). In fact, no such meeting had taken place, no request to pay brokerage was ever made by Topco, and Topco's buyer had never heard of D. Buckingham's, Ltd. (Tr. 567-568, 634-635, 816). On September 17, 1968, petitioner Brown wrote letters to D. Buckingham's, Ltd., and to the billing department of Hunt Oil, informing them that Buckingham's was to receive a commission of three percent on all Topco purchases as of September 1, 1968 (Tr. 472-473). Thereafter Hunt Oil forwarded monthly brokerage checks to D. Buckingham's, Ltd., although that company provided no brokerage services in connection with Topco or any other account. The proceeds from those brokerage checks, which ranged from $525 to $2,217.32 per month, were delivered to petitioners and others by Burkett (Tr. 527-528). Petitioners also took several precautions to maintain the secrecy of their fraudulent operation (Tr. 499, 506-508, 572-578).

In March 1969, following an annual meeting of stockholders, Tom Hunt, an employee of Hunt Oil and nephew of H. L. Hunt, began an investigation into substantial financial losses being suffered by HLH (Tr. 774-775, 845). Petitioner Curington tried, without success, to prevent Hunt from visiting HLH plants and speaking with employees during this investigation (Tr. 846-850). At the same time, petitioner Brown requested and received Burkett's resignation from HLH "because of an investigation that [Tom Hunt] had begun in Dallas

regarding HLH Products" (Tr. 516-517). In August 1969, petitioner Brown wrote a letter to D. Buckingham's, Ltd., cancelling the brokerage agreement (Tr. 525-526).

2. Petitioners testified in their defense and acknowledged forming a brokerage firm that provided no services to HLH. They claimed, however, that H. L. Hunt, who died in November 1974 (four months after the indictment and four months prior to trial), had authorized them to supplement their salaries by engaging in such conduct (Tr. 723, 732-736, 800-806). Petitioners produced three letters, purportedly signed by H. L. Hunt, authorizing them to engage in "personal business transactions," granting petitioner Curington a lifetime employment contract, and prohibiting any member of the Hunt family from inquiring at any time into any "outside business activities" of petitioners (Tr. 716-722). On cross-examination of petitioner Curington and in rebuttal, the government established that H. L. Hunt had been known to practice his signature before signing actual documents, that he would leave the practice signatures "lying any place," and that in 1971 he had unequivocally denied having signed or authorized the letters offered by petitioners (Tr. 787-788, 855, 857).

ARGUMENT

1. Petitioners' primary contention (Pet. 12-14) is that the government's evidence at trial was tainted by unlawful electronic surveillance undertaken by private persons and should have been suppressed pursuant to 18 U.S.C. 2515. However, both lower courts correctly concluded that the government's proof was not directly or indirectly attributable to any illegal wiretapping, and this finding of fact does not warrant further review. See *Berenyi* v. *Immigration Director*, 385 U.S. 630, 735; *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275.

Within a few months after the commencement of Tom Hunt's investigation into HLH's financial losses, suspicions focused on petitioners and another employee, Paul Rothermel. After the three men had resigned from the company in November 1969, Tom Hunt and his cousin, William Herbert Hunt, retained Dale Simpson, president of a Dallas detective agency, to assist in the investigation (Tr. 136-137). The Simpson investigation continued for a year and a half and resulted in a massive report, which was turned over to Hunt Oil (Tr. 199-200). Eventually, the report became the starting point for the federal investigation that culminated in petitioners' indictment.

Meanwhile, in January 1970, illegal wiretaps were discovered on the telephones of petitioners, Rothermel, Tom Hunt, and another officer and employee of Hunt Oil. These wiretaps had been installed on instructions of H. L. Hunt's sons, William Herbert and Nelson Bunker Hunt, who were subsequently indicted for their authorization of electronic surveillance. Jon Kelley, one of the wiretappers, testified at a hearing in the district court that on one occasion when he delivered tapes of the overheard conversations to the Hunt brothers, William Herbert Hunt had stated: "We need to get this information to Simpson" (Tr. 305).

Based on this statement and on the assertion that the government's denial of taint "does not comport with reason or experience" (Pet. 13), petitioners allege that the Simpson report was infected with information gained from the unlawful electronic surveillance ordered by William Herbert and Nelson Bunker Hunt and that the government's proof at trial, much of which was indirectly traceable to the report, should have been suppressed. At an evidentiary hearing held in the district court, however, the government clearly satisfied its burden of establishing that none of the information on which its investigation

was based, and none of its evidence at trial, had been derived in any way from the illegal wiretaps. For example, Tom Hunt, with whom Simpson principally dealt, testified that he never turned over wiretap information to Simpson and that the evidence discussed in the Simpson report had been gathered from the Hunt Oil Company files, which contained a wealth of incriminating documents (Tr. 137-138). Simpson, an auditor, and another person who worked with Simpson on the investigation also testified that they had no knowledge of the wiretaps and did not receive any information derived from them and that their report was grounded almost exclusively on a study of company records (Tr. 172-203, 211-228, 235-273). Furthermore, an F.B.I. agent who investigated the illegal wiretaps testified that he had found no evidence that Simpson had been aware of the taps (Tr. 345). As the court of appeals remarked (Pet. App. A-2):

> [Petitioners'] allegations [of taint] * * * are totally unsupported by any direct evidence in the record; at trial a number of people who worked on the Simpson report, including Mr. Simpson himself, denied that they had ever received any information from the illegal wiretaps. Furthermore, there was a substantial amount of testimony establishing that the Simpson report was compiled almost exclusively from business records kept by the [petitioners] themselves—a source wholly free from any taint of illegality. It is thus clear that the government carried its burden of proving that the evidence at issue here was derived from an independent source, * * * and that consequently the district court did not err in denying [petitioners'] motion to suppress.

2. Petitioners contend (Pet. 14-16) that the government's delay in bringing criminal charges against them deprived them of due process of law. Specifically, petitioners allege

that they were prejudiced by the government's failure to return an indictment until July 1974, four months before the death of H. L. Hunt, who they assert "could have potentially tipped the balance in Petitioners' favor" (Pet. 15).

It is undisputed that the indictment was returned within the applicable statute of limitations, which is "the primary guarantee against bringing overly stale criminal charges." *United States* v. *Ewell*, 383 U.S. 116, 122. Moreover, petitioners have not shown that "the pre-indictment delay * * * caused substantial prejudice to * * * [their right] to a fair trial and that the delay was an intentional device to gain tactical advantage over [them]." *United States* v. *Marion*, 404 U.S. 307, 324 (footnote omitted).[1] It was not until July 1973, in connection with the prosecution of William Herbert and Nelson Bunker Hunt, that the government first became aware of the possible mail fraud violations by petitioners. An inquiry was immediately begun by a postal inspector, and the indictment was returned in less than a year. Indeed, petitioners do not allege that any delay was intentional or was designed to hinder their defense.

Petitioners' claim of prejudice due to H. L. Hunt's death is similarly insubstantial. Petitioners and Hunt all appeared before the grand jury on June 19, 1974, at which time the deteriorating condition of Hunt's health was readily apparent to petitioners and their counsel (R. 252-253).[2] The indictments against petitioners were returned three weeks

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[1]The government's petition for a writ of certiorari in *United States* v. *Lovasco*, No. 75-1844, presents the question whether it is sufficient for a defendant who seeks dismissal of an indictment because of pre-indictment delay to satisfy either, rather than both, branches of the *Marion* test. Since petitioners have satisfied neither branch, there is no reason to hold this case pending disposition of the petition in *Lovasco*.

[2]"R." refers to the record on appeal in the court of appeals.

later. Although H. L. Hunt lived for four more months, petitioners never sought to take his deposition under Rule 15(a), Fed. R. Crim. P., nor did they move for a speedy trial (Tr. 332). In fact, trial was originally scheduled for November 18, 1974, shortly before Hunt's death, but was postponed because of petitioners' request for an extension of time in which to file pretrial motions (Tr. 327). Petitioners' conduct was thus wholly inconsistent with their present claim that H. L. Hunt's testimony was crucial to their defense—a claim that is, in any event, highly suspect on the record in this case.

3. Petitioners claim (Pet. 16-18) that they were denied a fair trial because the government suppressed an allegedly exculpatory statement by Paul Rothermel, a former Hunt Oil employee, that H. L. Hunt had been aware of the Buckingham brokerage arrangement and had approved of petitioners' supplementing their income through "side dealings." Petitioners contend that this statement had been made to I.R.S. Agent Gene Boren in 1971, but was not turned over to them until the final day of trial, following the close of the evidence (R. 339-348).

This allegation was fully explored and rejected by the district court, which found, after a hearing, that Rothermel's statement had been in the possession of the defense prior to trial (R. 420-422). Indeed, not only had petitioners received a copy of the statement before the close of testimony in the case (R. 376-377), but also petitioners' counsel was expressly advised by the government during trial that Rothermel had once made certain remarks favorable to the defense. Nonetheless, petitioners determined not to call Rothermel as a witness because of their doubts as to his credibility (R. 378). In addition, the record indicates that petitioners independently learned of the existence and substance of the Rothermel statement more than three months before trial, when Agent Boren testified at a pretrial hearing that he had interviewed petitioner Curington and Rothermel in March 1971 and that both men had told

him that H. L. Hunt had authorized the outside business activities in question. Agent Boren further testified that Rothermel's statements had been recorded, transcribed, and preserved in summary form and were available from the I.R.S. files (R. 422-425).

As this Court recently indicated in *United States* v. *Agurs*, No. 75-491, decided June 24, 1976, slip op. 12, n. 16, quoting from *Giles* v. *Maryland*, 386 U.S. 66, 98 (Fortas, J., concurring), there is no duty to disclose material "otherwise known to the defense." See also *United States* v. *Ross*, 511 F. 2d 757, 763 (C.A. 5), certiorari denied, 423 U.S. 836; cf. *Rosenberg* v. *United States*, 360 U.S. 367, 369-370; *United States* v. *Ruggiero*, 472 F. 2d 599, 604 (C.A. 2), certiorari denied, 412 U.S. 939. Here, even though petitioners were fully aware of the Rothermel statement, the government called it to petitioners' attention and supplied them with a copy of it during trial. The district court therefore correctly concluded that the government did not violate its obligations under *Brady* v. *Maryland*, 373 U.S. 83.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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